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No. 99-59

In The

Supreme Court of the United States

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Petitioner,

v.

RAMAH NAVAJO SCHOOL BOARD INC., PATERSON OIL CO., INC., and GUNDERSON OIL CO., INC.,

Respondents.

On Petition for Writ of Certiorari
To the New Mexico Court of Appeals

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' Brief in Opposition serves chiefly, and unsurprisingly, to emphasize the conflict between the decision below and this Court's emerging bright-line standards governing state taxation affecting Indian tribes. This conflict militates in favor of granting certiorari pursuant to Rule 10 (federal question conflict between state court decision and decisions of the Supreme Court).

1. Respondents and the Court Below Have Ignored This Court's Bright-Line Standards.

Recent Supreme Court decisions have increasingly drawn bright lines for determining the validity of state taxes that may impinge on Indian tribal entities. These bright lines sometimes favor tribes and sometimes the state. Largely they recognize, in the absence of explicit congressional provision, the primacy of tribal interest where state tax is imposed on an on-reservation transaction involving tribal members and the primacy of state interest for off-reservation transactions.

Thus, where the tax was imposed on Indian sales within Indian country, the fundamental power of a tribe to govern its members overrode state authority to impose tax, absent explicit permission from Congress. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). In *Chickasaw*, the direct effect on tribal sovereignty was controlling, even though the collateral effect from subsequent use of the gasoline on state highways substantially impacted the important state interest in funding state highways from tax on gasoline used thereon. On the other hand, fundamental state sovereignty interests prevailed when the state tax was imposed on an activity off reservation, outside the tribe's territory and sovereignty, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), or on an on-reservation activity not involving a tribe, *Arizona Department of Revenue v. Blaze Construction Co.*, ___ U.S. ___, 119 S.Ct. 957 (1999). Tribal sovereignty was implicated only collaterally. The tax was valid absent an explicit bar from Congress.

Only when tribal, state and federal governments are all fully implicated in an activity which involves both tribal entities and non-members and which takes place on the reservation, within the state, within the country, only then does the flexible implied-preemption balancing test[1] come into play. Where all three governments share the territorial component of sovereignty, they face mutual responsibility and mutual authority. *Cotton*, 490 U.S. at 188. Balancing these competing state, federal and tribal interests is appropriate.

The Court drew the bright lines in *Chickasaw* and *Blaze* consciously, expressly lauding the virtues of bright line standards in tax administration. Neither case applied, or overruled, the balancing test of *Cotton*, *Ramah I*, and *Bracker*. Rather they are the bright lines that bracket the balancing test, representing those cases where the tribal interest on one side and the state interest on the other are so dominant that any deviation from granting the dominant sovereign exclusive authority to tax must be made by express provision of Congress. Under these decisions, state tax imposed on off-reservation transactions among non-Indians clearly falls on the side of the bright line validating the state tax.

Initially, no direct tribal concerns arise from these off-reservation transactions between non-Indians. A collateral tribal interest arises only subsequently when the gasoline is resold to the tribal entity on the reservation with the tax imbedded in the cost. This Court's bright-line standards leaves to Congress the decision whether to elevate those collateral tribal interests over the state's direct interest in taxing these in-state, off-reservation transactions between non-Indians. Absent express preemption, the tax is valid. *Blaze; Chickasaw*; *Mescalero Apache Tribe v. Jones*. This "default"

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[1] *See Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (*Ramah I*); *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989).

position grants the sovereign with the most direct interest—here the state—the authority to tax.

Respondents desperately try to reframe the Question Presented to blur where, and on whom, the tax is imposed. Their Point I endeavors to distort this tax into one imposed on a reservation activity, so as to implicate the Indian preemption doctrine. They then argue that the balancing test of *Ramah I* has never been overruled. True, perhaps, but irrelevant. This tax is not imposed on a reservation activity. It is imposed on sales of gasoline to non-Indian distributors off-reservation, unquestionably an *off*-reservation activity. The balancing test of *Ramah I* is not implicated.

The fact that Respondents make the purported location of the taxed activity their first argument tells us two things. First, even they understand that one can reach preemption here only through the *Ramah I* balancing test of the Indian implied-preemption analysis. The court below acknowledged that this analysis informed its decision, Petition, App. 24, even though it purported to use "general" implied-preemption principles. Thus the importance for Respondents to turn the taxed activity into one occurring on the reservation in order to invoke *Ramah I*'s balancing test. Second, Respondents' argument heralds the deluge of cases to follow the decision below, each pleading a balancing-of-interest test to determine the validity of every state tax having any collateral economic effect on a tribal entity, regardless of where, and on whom, the tax is imposed. The Court's flexible balancing test remains appropriate when *on-reservation transactions involving tribal members and non-members* are taxed, and the separate sovereignties of tribes, states and the federal government are implicated. But the uncertainty and indeterminacy of the balancing test has never previously been extended to off-reservation transactions involving non-Indians, and should not be here.

Respondents are evidently sensitive to this prospective flood of litigation. They minimize the potentiality by distorting the whole *Blaze* litigation, alleging the tax there had no impact on tribal

governments. Brief in Opposition at 7. The multiple decisions in the *Blaze* litigation belie that claim. Blaze Construction Co. repeatedly argued that the Indian implied-preemption balancing test applied and the balance tipped in favor of the tribe because of the impact of the tax on tribal interests. Indeed, the Arizona Court of Appeals agreed, *Blaze Construction Co. Inc. v. State of Arizona*, 947 P.2d 836 (Ariz. App. 1997), *overruled*, 119 S.Ct. 957, and so did the New Mexico Court of Appeals. *Blaze Construction Co v. Taxation and Revenue Dept*, 871 P.2d 1368 (N.M. Ct. App. 1993), *overruled*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 514 U.S. 1016 (1995). Ultimately, both the United States and the New Mexico Supreme Courts held that implied preemption did not apply because no tribal member or entity was involved, even though the road-building activity took place on the reservation. The collateral impact on tribal interests in having the most miles of road built and the most tribal members employed did not overcome the predominant state interest. Without tribal involvement in the contract, tribal sovereignty interests were not sufficient to trigger the implied-preemption balancing test.

Similarly here, although there might be some collateral impact on tribal interests from the passed-on cost of tax (see Point 2), the court below wrongly ignored this Court's bright-line standards recognizing the primacy of state authority to tax this off-reservation activity not involving Indians. The Court should grant certiorari to preserve its recent precedents bringing some measure of simplicity and certainty to tax administration in this area.

2. **The Court Below Was Wrong to Find Preemption and Wrong to Find Disparate Treatment of Tribes Under the Indian Self Determination and Educational Assistance Act.**

The court of appeals found preemption implied within the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. § 450 *et seq.* The Department has argued in its Petition that the New Mexico court was wrong to apply a general implied-preemption standard to a state tax. See Petition at 8-9. But even

assuming general implied preemption were applicable, congressional intent remains the crucial touchstone of implied-preemption analysis. *Allis-Chalmers Corp. v. Leuck*, 471 U.S. 202, 208 (1985). Respondents in Point IV wish to preclude this Court in its analysis of congressional intent from examining the very provision of the ISDA that directly relates to purchases by contracting tribes. 25 U.S.C. § 450j(k) establishes when, and only when, tribes contracting under the ISDA may be granted federal government status. Such a head-in-sand posture acknowledges the conflict over a federal question—preemption—between the decision below and this Court's general preemption analysis focusing on congressional intent.

Moreover, Respondents' argument in Point IV about the complexities of funding under the ISDA simply highlights the legal error in finding preemption below. The crux of the court of appeals' decision held that the School Board was disadvantaged in contracting to run the school under the ISDA because it paid the passed-on cost of gasoline tax while the federal government would have enjoyed a deduction. But under the very provisions that govern funding under the ISDA, 25 U.S.C. §§ 2007 and 2008, emphasized by Respondents, Brief in Opposition at 10, the full price of the gasoline, including imbedded tax, is a legal and proper cost for the school. The School Board should have been fully reimbursed by the Secretary of Interior under ISDA, relieving it of any disadvantage. Section 2007 mandates that the Secretary consider in establishing the funding formula "special cost factors such as * * * special transportation and other costs of isolated and small schools." It is hard to imagine a more direct mandate to include full reimbursement for all direct costs of rural school busing.

Ultimately, the responsibility of the federal government to fund this cost is crucial. In analogous situations, the federal government clearly pays the passed-on cost of tax imposed on services it buys. *Arizona Department of Revenue v. Blaze*; *United States v. New Mexico*, 455 U.S. 720 (1982). Herein lies the real issue of disparate treatment. How can the federal government treat tribes differently by refusing to reimburse tribes for the passed-on cost of state tax?

The Ramah Chapter has aggressively challenged the Secretary when underfunded under ISDA contracts. It successfully contested the Secretary's failure to fully fund the tribe for indirect costs under Section 2008 in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). It is curious that they now abjure that line of argument here and pretend that the Secretary is not required to fully fund direct costs of the School Board operation under § 2007, particularly for a cost (passed-on state tax) that the federal government routinely pays itself.

CONCLUSION

For the foregoing reasons, Respondents' Brief in Opposition is not well taken and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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